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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In re Applications of ) MM Docket No. 88-577/  
LIBERTY PRODUCTIONS, ) File No. BPH-870831MI  
A LIMITED PARTNERSHIP )  
Et. Al. )  
For Construction Permit for  
New FM Channel 243C3  
Biltmore Forest, North Carolina

To: The Commission

OPPOSITION TO MOTION FOR STAY PENDENTE LITE

Respectfully submitted,

Liberty Productions, a Limited Partnership

Timothy K. Brady, Esq.  
P.O. Box 71309  
Newnan, GA 30271-1309

June 19, 2001

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## SUMMARY

Orion has failed to establish that its request for relief meets any of the four part test for granting a stay pending judicial review.

Orion has failed to demonstrate that it will suffer irreparable harm if the stay is not granted. Instead, Orion relies solely upon the loss of good will and ongoing operations from its operation on the Biltmore Forest frequency pursuant to temporary authority, which the Commission has previously held to be insufficient to support a showing of irreparable harm and which loss is part and parcel of any interim operation.

Orion has failed to demonstrate a likelihood of success on the merits of its proposed appeal. Orion relies solely upon its challenges to the Commission's determination that there is not only no substantial evidence, but no credible evidence, whatsoever, of misrepresentation. Orion has offered nothing to undermine that determination, which is supported by the record as a whole.

Orion has not demonstrated that the requested stay would not harm other interested parties. Orion ignores the substantial harm to Liberty if it is delayed further in receiving the benefits of the authorization for which it bid and paid.

Orion has offered no showing that the requested stay would serve the public interest. On the contrary the requested stay would disserve the public interest by: (a) delaying the receipt by the Treasury of over \$ 2,000,000.00 (b) having a chilling effect on future broadcast auction participants and (c) by delaying improved broadcast service to Biltmore Forest and the surrounding area.

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To: The Commission

OPPOSITION TO MOTION FOR STAY PENDENTE LITE

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its opposition to the Motion for Stay Pendente Lite, filed by Orion Communications, Ltd. ("Orion") on June 13, 2001 in the above referenced proceeding. In support whereof the following is shown:

1. Orion seeks a stay of the Commission's Memorandum Opinion and Order (FCC 01-129), released May 25, 2001 in the above proceeding. While Orion contends that it meets the traditional tests for a stay, 1/ it has failed to offer any showing sufficient to establish that it meets any element of the four part test. Accordingly, Orion's Motion must be denied.

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1. See: Washington Metropolitan Area Transit System v. Holiday Tours, Inc., 559 F.2d 841 (DC Cir. 1977); Virginia Petroleum Jobber's Association v. FPC, 259 F.2d 921 (DC Cir. 1958).

2. Orion must overcome a significant hurdle in order to justify the extraordinary relief requested. It must advance a compelling showing that it: (1) will suffer irreparable harm if the requested stay is not granted, (2) that it is likely to prevail on the merits of its appeal, (3) that the grant of its motion would not harm other interested parties, and (4) that the issuance of the requested stay would serve the public interest. Orion has utterly failed to establish any of these four elements.

I. Orion has failed to demonstrate that it will suffer irreparable harm if the stay is not granted.

3. Orion does not attempt to address the significant and necessary element of irreparable harm until the last page of its 20 page motion. There it advances only the conclusory statement that "irreparable injury" is "confirmed here by the accompanying Declaration of Betty Lee." In fact, the referenced Declaration does not come close to establishing a case of irreparable injury.

4. The vast majority of the referenced Declaration consists of irrelevant facts and legal argument. The only factual contention that could arguably be construed as an attempt to establish any irreparable injury is the fact that the goodwill and business that Orion has created as an interim operator on the Biltmore Forest frequency will be destroyed once the interim operation is terminated at the time Liberty is ready to commence operations.

5. As an initial matter, the Commission has previously rejected precisely this claim in the context of its order, rejecting Orion's Motion for Stay of the auction. See: Order (FCC 99-157), released July 2, 1999, at paragraph 14 ("Orion is not entitled to claim irreparable harm, absent a stay, because it faces the loss of its ongoing business as the interim operator for Biltmore Forest."). The reason Orion cannot rely upon the loss of goodwill and ongoing business generated from its operation under temporary authority is precisely because the operation is and has always been understood to be temporary.

6. The fact that Orion's goodwill and ongoing business as an interim operator will be destroyed when that interim operation is ended is and has been a forgone conclusion since Orion elected to operate on the basis of temporary authorization. Such a loss of goodwill and ongoing business is part and parcel of any interim operation.

7. Orion has conveniently forgotten that years ago when it requested that the Commission issue it a construction permit, based upon a nonfinal grant, that it explicitly acknowledged that the authorization it was requesting was not permanent and that it assumed the risk of any loss in undertaking its operation. See: February 22, 1993 Letter of Counsel for Orion. Subsequently, after Orion's underlying grant had been overturned and its unauthorized operation had been replaced by a duly authorized interim operator, Orion went to great lengths to regain the privilege of conducting a temporary operation on the Biltmore

Forest frequency, all the while knowing that such operation would be terminated once a permanent licensee had been selected by the FCC.

8. It has always been clear that, whoever the interim or temporary operator might be, that such operation on the frequency was to be of limited duration. In fact Orion has operated on the Biltmore Forest frequency for almost seven years, a period equal in length to a normal license term. Orion paid nothing for this privilege, which was awarded to it without even the requirement that it submit an application for interim operation, as required by the Commission's rules. In addition, its almost seven year operation has been on an unprecedented, for-profit basis. Of course Orion is never satisfied, apparently believing, contrary to its own assurances to the Commission, that once having commenced a temporary operation it has somehow gained "squatter's rights" to remain on the frequency forever. However, the Communications Act does not recognize squatter's rights and interim operators have no right to continue operating, once a permanent licensee is selected and has paid for the right to utilize the frequency at issue.

9. Accordingly, any economic injury Orion may suffer is part and parcel of the fact that its operating authority is and has always been temporary in nature and as such falls within the scope of the risk it voluntarily assumed. The loss of goodwill and ongoing business on which it relies is not irreparable injury, it is rather precisely the kind of economic loss every

interim operator incurs at the conclusion of the interim operation. <sup>2</sup>/

10. To the extent that Orion claims that it would suffer irreparable injury if its interim operation were terminated and subsequently resumed at some point in the future, such injury is entirely speculative and easily prevented. While the Commission has confirmed that Orion would be allowed to resume interim operation under such circumstances, Orion is certainly under no obligation to do so and any resulting injury would be solely a product of its own election.

II. Orion has failed to demonstrate a likelihood that it will prevail on the merit of its appeal.

11. As an initial matter, Orion cannot credibly demonstrate a likelihood of success on the merits of an appeal which it has not yet filed. Further, while Orion devotes 19 pages of its 20 page Motion to addressing purported flaws in the Memorandum Opinion and Order, it has failed to demonstrate that the Commission's decision is arbitrary, capricious, represents an abuse of discretion or is otherwise unlawful or that it is not supported by substantial evidence. See: 5 USC 706. Given that such a demonstration represents the only basis upon which the Court could overturn the Commission's decision in this case, Orion has failed to demonstrate a likelihood of success on the

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2. The joint interim operator, which the Commission selected to replace Orion, incurred losses of approximately \$ 100,000.00 as a result of its not-for-profit operation, which was terminated after only a few months.



merits on appeal.

12. Orion's analysis of the evidence is seriously biased, flawed, and characterized by a proclivity to mischaracterize as well as ignore any evidence which fails to support its desired outcome. In this regard, Orion follows the regrettable example of the Presiding Judge, who blatantly decided the issue at the time he added it, improperly placed both the burdens of proceeding and proof on Liberty, ignored Orion's influence on and attempts to influence Vickey Utter ("Utter"), engaged in improper ex parte communications with a material witness and simply ignored four hours of testimony of a witness who corroborated fully the testimony of Liberty's general partner.

13. Like the ALJ, Orion conveniently fails to consider the evidence established on the record as a whole in light of the standard for misrepresentation. It has been well and long established that a finding of misrepresentation must be based upon "substantial evidence of an intent to deceive." Armando Garcia, 3 FCC Rcd. 1065, 1067 (RB 1988), rev. den. 3 FCC Rcd. 4767 (1988). Both the Commission and the Court of Appeals have repeatedly held that "intent to deceive [is] an essential element of a misrepresentation or lack of candor showing." Weyburn Broadcasting v. FCC, 984 F.2d 1220, 1232 (DC Cir. 1993); see also Garden State Broadcasting v. FCC, 996 F.2d 386, 393 (DC Cir. 1993); RKO General, Inc. FCC, 670 F.2d 215, 225 (DC Cir. 1981), cert. den. 456 US 927 (1982). As the Commission correctly concluded, the record in this case not only lacks substantial

evidence of any intent to deceive, it is entirely void of any such evidence.

14. Orion's showing of likelihood of success on the merits of its proposed appeal is premised upon an analysis of the evidence which mischaracterizes much and ignores even more. A prime example is Orion's claim that Liberty sought to obtain a false affidavit from Utter. This contention represents a serious mischaracterization of the record. Even the deposition testimony which Orion offers in support of this claim facially demonstrates the falsity of its outrageous claim.

15. The record reflects that when Valerie Klemmer ("Klemmer") and Tim Warner ("Warner") went to meet with Utter in 1989, Klemmer took with her a prepared statement. (Tr. 915) Utter was unwilling to sign the prepared statement. However, both Utter's testimony and that of Warner make clear that that the only matter she found objectionable about the statement which Klemmer had prepared was that it indicated that she continued in 1989 to be willing to lease a site, which she was not. (Liberty Ex. 13, pp. 38; Tr. 915-16, 926) Utter agreed to prepare a statement of her own in her own words, omitting the problematic language and did so. (Liberty Ex. 13, pp. 38) Nothing in that statement (Liberty Ex. 7) contradicts the testimony of Klemmer and Warner. Thus, Orion's contention that Liberty sought to obtain a false statement not only is without merit, it is without any evidentiary support, whatsoever.

16. Orion's attempt to reconcile Utter's inconsistent statements, which were discussed in detail in the Memorandum Opinion and Order at paragraphs 66-70, is hopelessly flawed. The record as a whole reflects that Utter simply had very little recollection of the events of August, 1987. Her lack of recollection extended to her dealings with Brian Lee, as well as Klemmer. See e.g., Liberty Ex. 13, pp. 10-11, 17-19, 28-30.

17. Orion first attempts to rehabilitate Utter's February 22, 1989 statement (Liberty Ex. 6), which Orion prepared for her to sign and which contained false statements of fact. Utter readily repudiated the February 22, 1989, statement and indicated that it was the product of a lack of recollection. (Liberty Exs. 6; 13, pp. 33-39; Tr. 918-20)

18. Orion also fails to acknowledge the fact that the third statement signed by Utter on March 29, 1989, (Liberty Ex. 8) is unreliable. It is clear from Utter's deposition testimony and the testimony of Brian Lee that it was the product of the influence of Orion and its attorney, who told Utter what kinds of things to say and even dictated some of the language. (Liberty Ex. 13, pp. 48-50; Tr. 2506-08) In addition in Utter's opinion there was no need for any additional statement and she believed that her March 13, 1989, statement (Liberty Ex. 7) adequately set forth the relevant facts as she recalled them. (Liberty Ex. 13, pp. 49-51) Likewise, while Brian Lee suggested the third statement was necessary to resolve a conflict, he was unable to identify any conflict or any other reason it was necessary. (Tr. 2496-97)

19. Orion's claim that the ALJ found "Liberty's witnesses" "dissembling" is blatantly false. As the Commission correctly concluded (MO&O at para. 56) the ALJ held that Klemmer "blatantly dissembled" when she certified in August, 1987, that Liberty had reasonable assurance of the availability of its proposed site. Likewise, as the Commission again correctly notes (MO&O at para. 56), what the ALJ characterized as "strain[ing] credulity" was Liberty's contention that the evidence supported the conclusion that Liberty had obtained reasonable assurance of site availability in August, 1987, an argument which Liberty stands by to this day. 3/

20. Nowhere in the Initial Decision did the ALJ even suggest that any testimony which Klemmer gave at hearing under oath was false, misleading or lacking in candor. Instead, his adverse comments addressed her August, 1987, site certification. Furthermore, not only did the ALJ never suggest that any testimony given by Warner was false, misleading or lacking in candor, he improperly ignored Warner's testimony, because it fully corroborated that of Klemmer and, thus, undermined the resolution of the issues which the ALJ had pre-determined at the time they were added. See: Memorandum Opinion and Order (89M-1080), released April 5, 1989; Memorandum Opinion and Order (89M-1023), released March 30, 1989.

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3. In this regard the Mass Media Bureau fully supported Liberty's petition for leave to amend to specify a new transmitter site in March, 1989, when the one on Utter's property proved unavailable. See: Memorandum Opinion and Order (89M-1080), released April 5, 1989, at para. 2.

21. Accordingly, as the Commission correctly concluded, there simply were no adverse credibility findings made by the ALJ with respect to Liberty's witnesses' testimony at hearing, because the ALJ found no lack of veracity or candor in their testimony. His problem with Liberty's testimony was that he did not believe anyone could legitimately certify reasonable assurance of a transmitter site without having first obtained confirmation thereof from the landowner in writing. See: Memorandum Opinion and Order (89M-1023), released March 30, 1989, at Note 1; Memorandum Opinion and Order (89M-1080), released April 5, 1989, at para 8. While this view was contrary to Commission precedent, it is readily apparent that it contributed significantly to the ALJ's jaundiced view of the evidence.

22. The likelihood of success of Orion's appeal on the merits is fatally undermined in a number of respects. As noted above its attempt to reconcile Utter's inconsistent statements is unavailing, as is its attempt to find credibility findings where there are none. In addition, the testimony of Warner, which the ALJ ignored, fully corroborates that of Klemmer and the testimony of Orion's own Brian Lee corroborates that of Klemmer and Warner in critical respects. <sup>4</sup>/ In fact when Brian Lee's testimony is

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4. Brian Lee testified that Utter had acknowledged to him that she had in fact had a discussion in August, 1987 with Klemmer regarding leasing another portion of her property to Klemmer for a transmitter site and that she was willing to do so, but that she had not heard from Klemmer after that meeting and assumed she was no longer interested. (Tr. 2499-2500)

considered in conjunction of that of Klemmer and Warner, it is clear that if Liberty lacked reasonable assurance of the availability of a site on Utter's property, it was only due to a misunderstanding between Utter and Klemmer about when Klemmer was to get back to Utter, when she actually needed to enter into a lease or at some earlier, unspecified date. Accordingly, it is not surprising that, as the Commission found, the record is devoid of any evidence of misrepresentation or lack of candor.

III. Orion ignores the harm that the grant of its motion would entail to Liberty and other interested parties.

23. With regard to the third prerequisite for the grant of a stay, Orion offers only the conclusory statement that "Liberty has not broadcast and will not suffer overriding injury by maintaining the status quo pending review." This falls far short of the affirmative demonstration of lack of harm to other interested parties required to justify a stay. That such an opinion would be expressed by Orion is not surprising, given the fact that it has paid absolutely nothing for the use of the frequency upon which it has operated for the past seven years, despite the fact that it has had no greater claim on the permanent authorization than any other applicant.

24. While Orion is quick to recount the fact that it has expended a significant amount of money prosecuting its application, Liberty has not only expended a significant sum prosecuting its application (and defending itself against charges

trumped up by Orion) and supporting a nonprofit interim operation on the frequency, it has also advanced over \$ 300,000.00 to the U.S. Treasury in payment for the right to operate on the Biltmore Forest frequency and by June 19, 2001 will have remitted the balance due against a total of \$ 2,336,000.00. Even if the loss of Orion's goodwill and ongoing business from its interim operation could be considered (and it cannot for the reasons stated above), that loss would pale in comparison to what Liberty is paying for the right to operate on the frequency.

25. In addition, Liberty has already suffered irreparable harm from the Commission's unreasonable delay in granting its application, incurring over \$ 50,000.00 in interest charges on the funds it borrowed to pay the downpayment on its bid, depleting resources that otherwise would have been available to invest in the station. It is clear that when Congress expanded the Commission's authority to use auctions to award broadcast permits, it neither intended nor anticipated that Liberty or any other applicant would be required to wait a period of 18 months after winning the auction and remitting a down payment of over \$ 300,000.00. Precluding Liberty from utilizing the authorization for which it has bought and paid while Orion pursues any number of appeals and other efforts to delay the termination of what has from the outset been understood to be a interim operation would impose serious and unconscionable injury upon Liberty.

26. Accordingly, contrary to Orion's unsupported contentions, the grant of a stay would significantly harm other interested parties. Such harm, in the case of Liberty would far outweigh any cognizable harm that might be visited upon Orion or any other party.

IV. The public interest would be seriously and irrevocably disserved if the requested stay were granted.

27. As an initial matter, Congress has determined that the public interest is best served by obtaining for the benefit of the U.S. Treasury the highest payment the market will bear in exchange for the issuance of initial broadcast construction permits. Inherent in that determination is proposition that the sooner such funds are paid into the Treasury the better. Were the Commission to grant a stay under the present circumstances, it could not realistically expect Liberty to remit \$ 2,336,000.00 for a permit that it was not prepared to issue, forthwith. Indeed the Commission's own rules require the submission of the remaining balance due only at such time as the Commission is prepared to issue a permit. Thus, were a stay issued and the payment of the balance of Liberty's bid delayed, as BFBFM suggests, the public interest would suffer through the delay in receipt by the Treasury of over \$ 2,000,000.00.

28. Similarly, a stay would disserve the public interest by having a chilling effect on future auction participants. If a stay is issued under the present circumstances, it would send a



clear signal to participants in future broadcast auctions that, having won the auction, been found qualified by the Commission and having remitted their bids in full, they nevertheless could face significant delays in receiving the authorizations for which they had bid and paid. Anticipating such delays, potential future participants would be less willing to bid or at least less willing to bid as much as they would have been had the threat of delay not been raised.

29. Finally, while Orion clearly considers itself God's gift to Asheville, the truth is that Liberty will provide significantly superior service to Biltmore Forest and the surrounding environs with its Class C3 facilities. <sup>5</sup>/ Historically, in both the comparative and allocations context the Commission has consistently recognized that the public interest is served by increases in area and population coverage. During the days of comparative licensing the Commission routinely awarded credit for superior coverage and it continues to make determinations under 47 USC 307(b) based upon superior service to areas and populations. Accordingly, the public interest would be disserved were this improvement in service to be delayed as the result of the grant of a stay.

#### V. Conclusion.

30. Orion has failed to demonstrate that it will suffer any irreparable harm were the stay not to be granted. The loss of

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5. Despite the fact that Orion has operated on the frequency at issue for almost 7 years, it has undertaken no effort to provide this improved service to the public.

the goodwill and ongoing business from its operation under temporary authorization is part and parcel of every interim operation and cannot support a finding of irreparable harm. Despite its numerous efforts to resurrect the ALJ's adverse determinations on the site certification issue, Orion has done nothing to undermine the Commission's well supported conclusion that the ALJ's conclusion was not only unsupported by substantial evidence, it was unsupported by any credible evidence at all and, thus, its likelihood of success on the merits of Orion's appeal is virtually nil. Likewise, Orion has failed to demonstrate either that the grant of its Motion would not harm other parties or that it would serve the public interest. In fact precisely the opposite is true. The grant of the requested stay would not only seriously and irrevocably harm Liberty and other interested parties, it would also seriously disserve the public interest.

WHEREFORE, premises considered, the Motion for Stay Pendente Lite, filed by Orion, should be DENIED.

Respectfully Submitted

LIBERTY PRODUCTIONS,  
A LIMITED PARTNERSHIP

By:   
Timothy K. Brady  
Its Attorney

P.O. Box 71309  
Newnan, GA 30271-1309

June 19, 2001

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 18th  
day of June, 2001, served a copy of the foregoing Opposition to  
Motion for Stay Pendente Lite by First Class mail (except as  
otherwise noted), postage prepaid upon the following:

John Riffer, Esq.\*\*  
Associate General Counsel  
FCC  
445 12th Street, SW  
Washington, DC 20554

James W. Shook, Esq.\*\*  
Enforcement Bureau  
FCC  
445 12th Street, SW  
Washington, DC 20554


Donald J. Evans, Esq.  
Fletcher, Heald & Hildreth  
1300 N. 17th Street, 11th Floor  
Arlington, VA 22209  
(Counsel for Biltmore Forest  
Broadcasting FM, Inc.)

Stephen T. Yelverton, Esq.  
601 Pennsylvania Avenue, NW  
Suite 900 South  
Washington, DC 20005  
(Counsel for Willsyr Communications  
Limited Partnership)

Robert A. DePont, Esq.  
P.O. Box 386  
Annapolis, MD 21404  
(Counsel for Skyland Broadcasting Co.)

Steven C. Lekar, Esq.  
Butera & Andrews  
1301 Pennsylvania Avenue, NW  
Suite 500  
Washington, DC 20004  
(Counsel for Orion Communications Limited)

\*\* By overnight courier in lieu of mail

  
Timothy K. Brady